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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

REGENTS OF THE UNIVERSITY OF MICHIGAN,
Petitioner,
v.
SCOTT E. EWING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION, THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES AND THE FEDERATION OF STATE MEDICAL BOARDS AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether constitutional guarantees of due process require federal courts to conduct a *de novo* substantive review of a state university medical faculty's decision to dismiss a medical student for academic deficiencies when there is no genuine issue of procedural unfairness or unlawful motivation.

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BRIEF OF THE AMERICAN COUNCIL ON EDUCATION, THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES AND THE FEDERATION OF STATE MEDICAL BOARDS AS AMICI CURIAE SUPPORTING PETITIONER

This brief is filed on behalf of the American Council on Education, the Association of American Medical Colleges and the Federation of State Medical Boards in support of the petitioner. Consent to file this brief has been obtained from counsel for the parties and has been filed with the Clerk of the Court.

INTEREST OF THE AMICI CURIAE

The American Council on Education (the "Council") is one of the nation's oldest and most active educational associations. Founded in 1918 to advance higher educa-

tion, its membership includes over 1400 colleges and universities and 145 higher education organizations across the United States. As a national leader in higher education policymaking, the Council attempts to promote and preserve the interests of all who compose the academic community—students, faculty and administrators.

The Association of American Medical Colleges (the "Association") is a nonprofit corporation organized under the laws of the State of Illinois and having its principal place of business in the District of Columbia. Founded in 1876, the Association is a membership organization composed of all 127 accredited and operating nonprofit medical schools in the United States, over 436 teaching hospitals in which medical students receive their clinical education, and 76 academic and professional societies, with an aggregate membership of over 100,000 physicians and scholars, the members of which are actively engaged in medical education, biomedical research and the provision of patient care. The Association is actively involved in assuring the quality of medical education both directly through its own activities and through its sponsorship and support of agencies involved in accrediting programs in medical education: the Liaison Committee on Medical Education (programs leading to the M.D. degree), the Accreditation Council for Graduate Medical Education (post-graduate programs leading to certification in medical and surgical specialties), and the Accreditation Council for Continuing Medical Education (continuing education programs for practicing physicians). In addition, the Association is a founding member of the National Board of Medical Examiners and the Educational Council on Foreign Medical Graduates. Thus, the Association is deeply interested in the preservation of the proper role and authority of the medical school faculties through the duly constituted academic processes in the certification of achievement and competence reflected in the award of the M.D. degree.

The Federation of State Medical Boards (the "Federation") was founded in 1912 and includes as members the medical licensure boards of all 50 states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands. It includes 10 of the 16 osteopathic licensing boards, and as affiliate members, 10 Canadian provincial licensing boards. It is a member of the National Board of Medical Examiners, the Educational Council on Foreign Medical Graduates, the Accreditation Council for Graduate Medical Education, and the National Board of Medical Specialties. The Federation's member medical boards regard a validly awarded M.D. degree as the fundamental, though not the only, prerequisite for the award of medical licensure. Any decision which would deprive medical faculties of their proper role in the award of the M.D. degree would undermine the degree's integrity and value for licensure purposes.

The Council, Association and Federation appear as *amici curiae* to oppose the Court of Appeals' unjustifiable interference with the good-faith efforts of the University of Michigan's medical faculty to prescribe academic standards and assess the academic qualifications of its students.

SUMMARY OF ARGUMENT

Petitioner Scott Ewing failed the comprehensive National Board of Medical Examiners (NBME) Part I examination, which University of Michigan medical students must pass before they may treat patients during the clinical phase of their training. Ewing had previously received many unfavorable evaluations of his academic performance and was on notice that further deficiencies would be grounds for dismissal when he took the test. More than twenty faculty members spent hundreds of hours counseling him and reconsidering his case before the responsible faculty committee decided that he should not continue in the program. The committee's conclusion

was supported by ample basis for judging, from Ewing's erratic performance as a medical student, that he was unsuited to become a physician.

Ewing does not challenge the fairness or adequacy of the procedures leading up to his dismissal. There is no evidence or allegation that the medical faculty's judgment was based on any ill will or unlawful motivation, or that it reflected anything less than an honest and careful evaluation of Ewing's performance and competence to be a physician.

The Court of Appeals nevertheless conducted a *de novo* reexamination of the academic issues and held that the decision to dismiss Ewing was "arbitrary and capricious." It concluded that, since other University of Michigan medical students had been permitted to retake the test, Ewing should be given the same chance. (742 F.2d at 915.) And it made its own judgment that Ewing was "qualified" under the University's standards to take the test again. (*Id.* at 916.) In so ruling, the Court substituted its judgment of appropriate academic standards for the medical faculty's; it effectively directed the University to assess academic performance under court-imposed standardized guidelines rather than through individual case-by-case evaluation of each student's past achievement and future promise.

The decision below ignores the longstanding judicial policy of deferring to academic decisions. It threatens the freedom of schools and faculties to formulate and apply academic standards. If the decision is sustained, every academic suspension or dismissal of a state university student is potentially a federal case, open to *de novo* evidentiary reexamination by United States district courts under 42 U.S.C. § 1983, no matter how fair the university's procedures and honest its evaluations. The mere threat of such litigation would disrupt public universities' ability, and infringe their freedom, to establish and uphold academic standards. It would demoralize their

faculties. Limited financial and teaching resources would be committed to avoiding litigation and defending it, rather than to educating students.

In Section 1983 cases involving public universities, federal courts can and should entertain complaints posing genuine issues that academic dismissals have been tainted by unfair procedures, unlawful discrimination, or retaliation against the exercise of protected freedoms. But there is no constitutional or statutory predicate for substantive reexamination by the federal courts of the merits of a university's academic decisions under an "arbitrary and capricious" or other standard. Once a court finds that a "professional [academic] judgment was in fact exercised," it should not inquire further into the correctness of the judgment. *See Youngberg* v. *Romeo*, 457 U.S. 307, 321 (1982). Universities and their faculties should be able to make good-faith academic judgments, under careful and deliberate procedures, free from the fear and burdens of judicial intervention.

ARGUMENT

I. The Court of Appeals Improperly Overrode the Medical Faculty's Careful and Deliberate Academic Judgment.

The *amici* and their members are committed to the principle that academic suspension or dismissal decisions should be made in accordance with procedures that are fair, careful and deliberate. The values of the academic community cannot flourish where academic standards are compromised by malice, unlawful discrimination, unfair procedures or efforts to punish the exercise of constitutionally protected freedoms of expression. In those rare cases where academic decisions may be tainted by such flaws, and schools provide no remedy, the courts should be available under 42 U.S.C. § 1983 or other appropriate jurisdictional bases to afford redress.

But the values of the academic community can also be undermined by needless, ill-considered judicial interfer-

ence with academic decisions. Precisely that danger is posed by decisions like that of the court below. In applying an "arbitrary and capricious" standard of review to academic decisionmaking, the court of appeals overrode a conscientious academic judgment of the University's medical faculty that was reached in a fair, "careful and deliberate" manner. *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78, 85 (1978).

A. *The Court of Appeals Ignored the Longstanding Judicial Policy Requiring Deference to the Academic Decisions of Colleges and Universities.*

The court of appeals did not even pay lip service to the principle that the judiciary will not substitute its judgment for that of colleges and universities in academic matters. Although the district court conducted a trial *de novo*—improperly, in our view (*see* pp. 16-21, *infra*)—it ultimately reached the correct conclusion that the case presented no issue within the competence of courts:

> "I am not permitted to review the ultimate academic qualification decision which has been made in a 'careful and deliberate' manner, *Horowitz*, 435 U.S. at 85, and not influenced by ill will or ulterior purposes .... This type of limited review represents the only practical and workable judicial approach to academic qualification decision-making .... [I]t is for prudential as well as pragmatic reasons that the propriety of academic decisions cannot be reviewed." 559 F. Supp. at 799.

In reversing, the court of appeals found no lack of "careful and deliberate" decisionmaking, no procedural unfairness, no unlawful discrimination, nor any "ill will or ulterior purposes." Instead the court held that the medical faculty's decision was "arbitrary and capricious" because it denied Ewing another chance to take the NMBE Part I test, while retests were given to the other students who had failed during the period 1975-82. (742 F.2d at 916). The court of appeals did not explain the balancing process by which the grant of retests to different students outweighed Ewing's undisputed personal deficiencies:

- Ewing's prior academic record was replete with academic deficiencies, irregular progress and "last chances" (559 F. Supp. at 793-95);
- Ewing was on notice that further deficiencies would be cause for dismissal at the time he took the NMBE test (J.A. 145-46);
- The district court found that Ewing's grade on the NMBE Part I test was the lowest in the University's history (559 F. Supp. at 794);
- Ewing's case received elaborate, individualized consideration by the medical faculty's Promotion and Review Committee, and was unanimously upheld on appeal to the Executive Committee, in proceedings in which Ewing participated personally (559 F. Supp. at 794-96);
- A number of other students had been dismissed from the medical school before having the chance to take the test even a first time (J.A. 66, 165).

The court of appeals unquestionably rendered an *academic* judgment. It concluded that the medical faculty should have given greater—indeed, determinative—weight to the "precedents" established by the cases of other students, and disregarded Ewing's individual record and attributes. In this fashion, the court of appeals imposed decisionmaking rules characteristic of administrative agencies upon the very different process of prescribing and upholding academic standards for persons who aspire to be physicians.

We are unaware of any precedent for the court of appeals' substitution of its judgment for the medical faculty's. This Court's recent decision in *Board of Curators* v. *Horowitz*, *supra*, 435 U.S. at 92—another medical

school dismissal case arising under 42 U.S.C. § 1983—stressed that "[c]ourts are particularly ill-equipped to evaluate academic performance" and specifically admonished that neither procedural due process claims nor an "arbitrary and capricious" review standard should be misused as a means of "judicial intrusion into academic decisionmaking." [1]

Lower federal courts, too, both before and after *Horowitz*, have been faithful to the principle that courts do not sit to review the good-faith *academic* decisions of colleges and universities. One of the cases most frequently cited is *Connelly* v. *University of Vermont*, 244 F. Supp. 156 (D. Vt. 1965), which collected and analyzed numerous (mostly private college) cases. It discerned from them the longstanding rule that courts should strictly limit their review of challenged academic dismissals to factual questions not involving academic expertise:

> "The effect of these decisions is to give the school authorities absolute discretion in determining whether a student has been delinquent in his studies, and to place the burden on the student of showing that his dismissal was motivated by arbitrariness, capriciousness or bad faith. The reason for this rule is that in matters of scholarship, the school authorities are uniquely qualified by training and experience to judge the qualifications of a student, and efficiency of instruction depends in no small degree upon the school faculty's freedom from interference from other noneducational tribunals." *Id.* at 160.

[1] *Horowitz* underscores in a number of ways the uniqueness of academic decisionmaking and the deference that must be exercised by reviewing courts. The *school* is "the best judge of its students' academic performance and their ability to master the required curriculum." 435 U.S. at 85 n.2. Hearings are not required in academic dismissal or suspension cases (as distinct from disciplinary cases) because a "school is an academic institution, not a courtroom or administrative hearing room" (*id.* at 88) and academic judgments are inherently "more subjective and evaluative" than fact questions surrounding disciplinary cases (*id.* at 90).

Though the precise formulations vary, all the other federal decisions of which we are aware were careful not to substitute the court's judgment for that of schools in academic matters. They consistently hold that a plaintiff cannot secure judicial redetermination of the merits of an *academic* decision. Instead, the plaintiff must tender a genuine issue of fact or law lying within judicial competence. Such issues could arise where a plaintiff presents "positive evidence of ill will or bad motive;" [2] "malice;" [3] inadequacy of fact-finding procedures where educational officials' decisions go beyond academic dismissal or suspension and impose a disability or stigma; [4] or facts indicating racial or other impermissible discrimination.[5] Similarly, courts can determine, without interfering in the merits of academic judgments, whether a dismissal or suspension decision is a pretext for punishing or deterring the exercise of constitutionally protected freedoms.[6]

Many of the federal decisions hold open the possibility —noted but left unresolved in *Horowitz*, *supra*, 435 U.S. at 91-92—that a reviewing court could set aside an academic decision having "no rational basis" [7] or that is

[2] Gaspar v. Bruton, 513 F.2d 843, 851 (10th Cir. 1975); *see also* Hines v. Rinker, 667 F.2d 699, 703 (8th Cir. 1981) ("the decision to dismiss was motivated by bad faith or ill will unrelated to academic performance").

[3] Depperman v. University of Kentucky, 371 F. Supp. 73, 76 (E.D. Ky. 1974).

[4] Greenhill v. Bailey, 519 F.2d 5, 8 (8th Cir. 1975), discussed in *Horowitz*, *supra*, 435 U.S. at 88 n.5; Aubuchon v. Olsen, 467 F. Supp. 568, 572 (E.D. Mo. 1979).

[5] *See* Debra P. v. Turlington, 644 F.2d 397, 408 (5th Cir. 1981); Watson v. University of South Alabama College of Medicine, 463 F. Supp. 720 (S.D. Alabama 1979).

[6] *See* Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969); Shelton v. Tucker, 364 U.S. 479 (1960).

[7] Hines v. Rinker, *supra*, 667 F.2d at 699-700.

"arbitrary or capricious." [8] But no court conducted its own plenary review of the merits of the academic decision and reached a result different from that of the college or university. Only the court below has employed the "arbitrary and capricious" standard of review to impermissibly "intru[de] into academic decisionmaking." *Horowitz*, *supra*, at 92. The court below did precisely what federal courts should not do: it acted as " 'a sort of educational ombudsman' " exercising a free hand to impose its views on the University. *Keys* v. *Sawyer*, *supra*, 353 F. Supp. at 939.

B. *The Court of Appeals' Decision Infringes Academic Freedom and Illustrates the Evils of Judicial Interference with Academic Decisions.*

The reasons for judicial deference to academic decisions are of long standing and are compelling. Long before *Horowitz*, state courts had firmly established the rule of deference in cases challenging the academic dismissal decisions of public and private schools. In *Barnard* v. *Inhabitants of Shelburne*, 216 Mass. 19, 102 N.E. 1095 (1913), for example, the Supreme Judicial Court held that a jury should not be permitted to decide whether educators had an adequate basis for excluding plaintiff from a public school for substandard academic performance:

> "So long as the school committee act in good faith their conduct in formulating and applying standards and making decisions touching this matter is not subject to review by any other tribunal. It is obvious that efficiency of instruction depends in no small degree upon this feature of our school system." 102 N.E. at 1096.

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[8] *See, e.g.*, Stevens v. Hunt, 646 F.2d 1168, 1170 (6th Cir. 1981); Connelly v. University of Vermont, *supra*, 244 F. Supp. at 160; Keys v. Sawyer, 353 F. Supp. 936, 940 (S.D. Tex. 1973); Depperman v. University of Kentucky, *supra*, 371 F. Supp. at 76; Aubuchon v. Olsen, *supra*, 467 F. Supp. at 572; Bleicker v. Board of Trustees, 485 F. Supp. 1387 (S.D. Ohio 1980).

Many cases, involving both public [9] and private [10] institutions of higher education, adopted comparable principles of review for academic decisions—requiring that the plaintiff come forward and prove the "affirmative proposition" that the decision was actually founded on "bad faith" or similar non-academic factors within the competence of judges. *Barnard* v. *Inhabitants of Shelburne*, *supra*, 102 N.E. at 1097.

These cases recognize that academic institutions, particularly at the graduate and professional levels, are unique. They are not like businesses, government agencies, law firms or courts. Each school aspires above all else to educate students in accordance with that institution's traditional methods and standards of academic attainment. One of the inestimable strengths of this nation's academic institutions is their diversity; our medical schools, law schools and graduate schools—both public and private—have distinct characters and individual identities that exist because they follow their own approaches to teaching and learning. This diversity is the product of tradition and could not exist if schools lacked the freedom to formulate and apply their own academic standards. *See Sweezy* v. *New Hampshire*, 354 U.S. 234, 262-63 (1957) (Frankfurter, J., concurring); J. W. Gardner, *Excellence*, pp. 82-86 (1961).

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[9] *See, e.g.*, People ex rel. Moore v. Lory, 94 Colo. 595, 31 P.2d 1112 (1934); West v. Board of Trustees of Miami University, 41 Ohio App. 367, 181 N.E. 144 (1931); Coffelt v. Nicholson, 224 Ark. 176, 272 S.W.2d 309 (1954).

[10] *See, e.g.*, Tate v. North Pacific College, 70 Or. 160, 140 P. 743 (1914); Frank v. Marquette University, 209 Wis. 372, 245 N.W. 125 (1932); Dehaan v. Brandeis University, 150 F. Supp. 626, 627 (D. Mass. 1957); Edde v. Columbia University, 8 Misc.2d 795, 168 N.Y.S.2d 643 (N.Y. Sup. Ct. 1957), *aff'd*, 156 N.E.2d 458, *cert. denied*, 359 U.S. 956 (1958).

It is always disappointing when a student fails to meet a school's academic standards and is dismissed. Unlike many other institutions, however, a school rarely takes that final step until the student has been given ample opportunity to overcome deficiencies. Ewing certainly had all reasonable opportunities—indeed, a string of "last chances"—and faculty members spent literally hundreds of hours of time in their ultimately unsuccessful efforts to assist him in meeting the University's standards. (J.A. 71, 78). But when the Promotion and Review Committee finally reached the difficult but unanimous conclusion that Ewing still could not satisfy the University's standards for entering into the clinical phase of training, dismissal was the only decision that could uphold the Medical School's traditions and standards.

Surely it would have been easier to give Ewing yet another chance, which would have avoided litigation and postponed the need to make an unpleasant decision. But selecting those who should be permitted to pursue a degree is basic to an institution's "academic integrity" because "the diploma constitutes public endorsement of competence and achievement." *Mahavongsanan* v. *Hall*, 529 F.2d 448, 449 (5th Cir. 1976). The public, which relies on the skill and training of physicians, is better served by conscientious academic decisions than by judicial standard-setting. *Connelly* v. *University of Vermont*, *supra*, 244 F. Supp. at 160-61. The serious consequences of medical incompetence establish a compelling public interest in protecting the ability of medical faculties to uphold strict standards.

Without judicial deference to academic judgments, it would be difficult indeed to preserve the academic "freedom of teachers to teach and of students to learn." *Epperson* v. *Arkansas*, 393 U.S. 97, 105 (1968). Academic freedom is a "special concern of the First Amendment." *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.). The " 'four

essential freedoms' " of a university are "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.*, *quoting Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). And a public college or university equally enjoys the right "to select its . . . students and evaluate their performances, and to define and maintain its standards of academic accomplishment." *Cooper* v. *Ross*, 472 F. Supp. 802, 809 (E.D. Ark. 1979). The court of appeals' decision fails to honor these principles of academic freedom and the special character of the academic community.

The perverse consequences of the decision below also illustrate the importance of judicial deference to academic decisions. We have already observed that the court of appeals held that the medical school's grant of retests to other students in the past should have governed Ewing's case. (742 F.2d at 915.) The unarticulated assumptions underlying the court's "precedential" approach to academic standards are that (1) there could be no relevant difference in the records and attributes of the students granted retests, on the one hand, and Ewing, on the other; (2) the faculty's subjective assessments of Ewing's personal fitness to be a doctor should not be taken into account; and (3) schools may not judge each student on his or her individual merits, but must adopt objective and standardized criteria for making academic decisions. None of these assumptions is supported by the record or by applicable legal principles.

To the contrary, the record demonstrates that the court of appeals' bureaucratic thinking was utterly alien to the medical school academic community. One professor who was closely involved in the review of Ewing's case testified that he had never even considered whether other students had been permitted to retake the test, and he regarded other cases as irrelevant, because the school's policy was to treat each student as a unique, individual

case. (Tr. 280-81.) The individual counselling and consideration that Ewing received at all stages of his career at the medical school attests to the school's efforts to avoid standardized, "objective" treatment of its students. It is precisely the need for individualistic and necessarily subjective judgments that accounts for the fact that "the determination whether to dismiss a student for academic reasons . . . is not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Horowitz*, *supra*, 435 U.S. at 89-90. Yet the court of appeals would impose rigid rules of uniformity, ignoring that "different students [are] treated differently and accorded individual treatment." *Watson* v. *University of South Alabama College of Medicine*, *supra*, 463 F. Supp. at 727; *see also Pace College* v. *Commission on Human Rights*, 38 N.Y.2d 28, 38, 339 N.E.2d 880, 890 (1975).

If there could be any need for further evidence of the flaws in the court of appeals' approach, one need only consider the host of other questions that it implicitly raised for potential future litigation. If Ewing must be given a retest, what of the number of students who were never allowed to sit for the test at all? (J.A. 66, 165.) Could there be any circumstances in the future in which the medical school may deny a retest to a student who has failed the examination? And are all academic decisions to be judged henceforth by a rule of "consistency" under which the poorest academic record tolerated in the past becomes a judicially enforceable "minimum acceptable standard" for the future?

The decision below accordingly must be reversed. Ewing, who participated actively and repeatedly in the many sessions during which his case was considered and reconsidered, was afforded more procedural protection than the medical student in *Horowitz*, 435 U.S. at 85.[11]

[11] The plaintiff in *Horowitz* was not allowed to appear personally before the academic committees responsible for the decision to dismiss her. 435 U.S. at 80-82. By contrast, after Ewing failed the test, his case was considered by a Promotion and Review Board consisting of fifteen faculty and course directors. This Board reviewed Ewing's entire academic record and decided unanimously that he should be dismissed from the medical school. At Ewing's request, however, the Board reconvened with seventeen medical school professors in attendance, permitted Ewing to have two representatives present, listened to Ewing present his reasons and evidence why he should not be dropped, and considered a written submission in his defense. After this elaborate hearing the decision to dismiss Ewing was reaffirmed, again unanimously. 559 F. Supp. at 794.

Ewing's case was then reviewed, at his request, by the medical school's six-member Executive Committee; again he was permitted to appear and to explain his failure, and again the decision to dismiss him was unanimous. Ewing appeared before this committee on still two more occasions, and again presented documents and testimony; his dismissal was unanimously reaffirmed after each session. *Id.*

There is no claim that the University's procedures were in any way unfair, unlawfully discriminatory, the product of malice or ill will, or designed to punish or deter the exercise of constitutionally protected freedoms. Nor was there any basis for a finding or conclusion that the University's decision was "arbitrary and capricious."

More fundamentally, however, there was no justification for the *de novo* reexamination of the faculty's academic decision undertaken by both the district court and court of appeals. Since the mere prospect of such reexamination of purely academic issues is damaging to academic freedom and decisionmaking, we explain in the following section why this Court should frame in clear terms a standard and scope of review that will prevent the "judicial intrusion into academic decisionmaking" deplored in *Horowitz*, 435 U.S. at 92.

II. There Is No Constitutional or Statutory Basis for Federal Courts to Engage in Substantive *De Novo* Reexamination of the Merits of Academic Decisions.

Horowitz left open two important questions: whether an academic dismissal involves liberty or other interests

"constitutionally protected against deprivation without procedural due process," 435 U.S. at 84, and whether federal courts may conduct a "substantive due process" review of academic dismissals under the "arbitrary and capricious" standard, *id.* at 91-92.

As to the procedural question, the *amici* are strongly committed to an academic process that provides, in every instance of academic dismissal or suspension, the "careful and deliberate"—but informal—procedures upheld as adequate in *Horowitz*, 435 U.S. at 85. Institutions of higher education, public and private alike, agree that schools are obliged to keep students informed of their progress; to assist them in understanding and attempting to overcome their shortcomings; and to dismiss a student only after careful review of his or her case. Higher education is a precious opportunity and both public and private schools recognize the importance of ensuring that decisions affecting students' futures be based on procedures such as those approved in *Horowitz*. We accordingly do not oppose judicial review of the adequacy of such informal *procedures*, whether based on due process, contract or other theories of action.[12]

The "substantive due process" review undertaken below is a different matter entirely. It is reminiscent of the discredited doctrine under which federal courts once re-

[12] Because the *amici* agree that students should not be dismissed from educational institutions without appropriate procedural protections, we do not address directly the first issue left open by *Horowitz*—whether an academic dismissal involves constitutionally protected "liberty" or "property" interests. We do not disagree with the assumption of both lower courts that such interests existed here. Most academic dismissal cases will implicate property interests arising from the university-student contractual arrangement or other state law source, if not a liberty interest arising from the potential impact of the university's actions on the student's reputation or career. *See Horowitz, supra,* 435 U.S. at 82-84; Bishop v. Wood, 426 U.S. 341 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972).

viewed the merits of state economic legislation under a standard of reasonableness. *See Ferguson* v. *Skrupa*, 372 U.S. 726, 728-32 (1963). Few courts have abused the "arbitrary and capricious" review standard in the manner of the court of appeals, and virtually all who have engaged in such a review have ultimately deferred to academic judgments and expertise. But this case shows that the mere availability of an "arbitrary and capricious" review can be pernicious, because it can embroil even the most conscientious and good-faith academic decisions in protracted litigation in which courts conduct *de novo* reexamination of purely academic matters.

Here, the University is still locked in litigation some four years after Ewing failed the NMBE test. After devoting hundreds of faculty-hours to review and reconsideration of his case, the University was sued in federal court. Faculty members spent many more hours testifying in depositions and at trial, explaining the basis of their academic decisions. The faculty's decisions with respect to many other students were drawn into the case, and the court was in effect asked to compare their academic performance and potential to be a physician with Ewing's. Only after the completion of discovery and trial did the district court finally recognize that it could not and should not make the academic judgments implicit in the "arbitrary and capricious" standard. (559 F. Supp. at 799.) Other reported cases show that federal courts are conducting similar *de novo* reexaminations of academic decisions, only to realize belatedly that the academic character of the issues places them beyond judicial competence.[13]

The mere prospect of such litigation disrupts and demoralizes the academic community. Faculty members,

[13] *See, e.g.*, Stevens v. Hunt, *supra*, 646 F.2d 1168; Watson v. University of South Alabama College of Medicine, *supra*, 463 F. Supp. 720; Aubuchon v. Olsen, *supra*, 467 F. Supp. 568.

concerned about being named as defendants or losing time diverted by litigation, can only be more inclined to compromise academic standards. Subjective judgments and individualized consideration of cases will present greater risks of litigation than reliance on less meaningful but "objective" standards of performance. If those who formulate and apply academic standards must take into account the risk that their good-faith academic evaluations can be reexamined on the merits by the courts, the teaching and evaluation process can only become defensive, more formalized, and adversarial with respect to the students who most need sympathetic support and assistance. This is precisely the risk this Court recognized in *Horowitz*, 435 U.S. at 90. Prudent university counsel would advise their clients *not* to give students like Ewing special attention and extra "chances" to make good, but rather to make an objective "record" that will hold up in court in the event of litigation.

We accordingly urge the Court to resolve the "substantive due process" review question left open in *Horowitz* by holding that federal courts should not conduct their own *de novo* review of the merits of academic decisions on an "arbitrary and capricious," "rational basis," or similar standard of review. The federal courts do not ordinarily engage in substantive reviews of state decisions, but concern themselves instead with whether a decision affecting a liberty or property interest has been made in accordance with procedures " 'appropriate to the nature of the case.' " *Goss* v. *Lopez*, 419 U.S. 565, 579 (1975), *quoting Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). Indeed, the Seventh Circuit adopted the view, in an academic tenure case, that if there is no violation of procedural due process "it follows that no substantive due process claim has been stated either." *McElearney* v. *University of Illinois*, 612 F.2d 285, 291 (7th Cir. 1979).

Here, the procedures for consideration and reconsideration of Ewing's case were more elaborate than the informal procedures held adequate in *Horowitz*. Ewing was afforded the chance to appear personally before the responsible faculty committees on several occasions. (559 F. Supp. at 794.) Where a faculty follows procedures so amply calculated to avoid mistakes or arbitrariness, there can be no reasonable need for a judicial reexamination of the merits of the academic decision.

That is particularly so because the kind of "state action" involved here—academic decisionmaking—does not warrant the heightened judicial scrutiny that was accorded by the court of appeals.[14] There is no evidence of which we are aware that the academic decisionmaking process is resulting in arbitrary and capricious suspensions or dismissals, or is otherwise in need of judicial supervision. Substantive review of state actions is often an appropriate procedure in cases alleging deprivation of the fundamental rights and liberties embodied in the Constitution—such as freedoms of expression, religion, privacy and the right to equal treatment without regard to race or sex.[15] But there is no "substantive constitutional righ[t]" to public education requiring special judicial vigilance. *See San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 33 (1973). On the contrary, academic freedom itself is a fundamental interest that is burdened by judicial reexamination of the merits of academic decisions, and the balancing of interests at stake inclines strongly in favor of protecting the academic process from the disruption of unnecessary judicial intrusion.

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[14] *See* Bishop v. Wood, 426 U.S. 341, 349-50 (1976); Clark v. Whiting, 607 F.2d 634, 638 (4th Cir. 1979) (dismissing equal protection and due process claims of professor denied promotion, noting that "not every difference in promotion treatment . . . rises to the level of a constitutional deprivation . . . .").

[15] *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Kelley v. Johnson, 425 U.S. 238, 244 (1976); Brown v. Board of Education, 347 U.S. 483, 493-95 (1954).

The appropriate balancing of rights and interests here is, in the final analysis, quite like that performed in *Youngberg* v. *Romeo*, 457 U.S. 307 (1982). There, a patient in a state mental institution sued under Section 1983 to vindicate his alleged right to "minimally adequate care and treatment." Concerned that the "courts must show deference to the judgment exercised by a qualified [medical] professional" (457 U.S. at 322), and that those providing treatment "should not be required to make each decision in the shadow of an action for damages" (*id.* at 325), this Court held that reviewing courts must limit their review to determining only "that professional judgment was in fact exercised." *Id.* at 321. In this way, the courts would avoid embroilment in medical issues beyond their competence unless there were facts "demonstrat-[ing] that the person responsible actually did not base the decision on such a [professional] judgment." *Id.* at 323.

Federal courts must of course remain free in Section 1983 cases to review non-academic matters within their competence. Such review would be appropriate where plaintiffs raise a genuine issue calling into question the fairness of the procedures that were followed;[16] show malice, ill will, or unlawful discrimination by the decisionmakers; or demonstrate attempts to punish or deter students' exercise of constitutionally protected freedoms. Review of these matters does not interfere with academic judgments made in good faith, and the courts should examine the facts where a student presents "positive evidence" that an academic decision was influenced by impermissible considerations or motivations. *Gaspar* v. *Bruton*, *supra*, 513 F.2d at 851; *see also*, *Jansen* v.

[16] It bears repeating that informal procedures, such as those held adequate in *Horowitz*, are all that should be required for academic dismissal cases. For reasons discussed in *Horowitz* and this brief (pp. 7-10, *supra*), formal adversary procedures are not compatible with academic decisionmaking and the educational process.

Emory University, 440 F. Supp. 1060, 1063 (N.D. Ga. 1977), *aff'd*, 579 F.2d 45 (5th Cir. 1978); *Hubbard* v. *John Tyler Community College*, 455 F. Supp. 753, 756 (E.D. Va. 1978); *Keys* v. *Sawyer*, *supra*, 353 F. Supp. at 939; *Dietz* v. *American Dental Ass'n*, 479 F. Supp. 554, 559 (E.D. Mich. 1979).

By so placing on plaintiffs the "burden of proving . . . an affirmative proposition," and not permitting substantive review of the merits of academic judgments, academic decisionmaking will enjoy the protections it needs and deserves. *Barnard* v. *Inhabitants of Shelburne*, *supra*, 102 N.E. at 1097.

CONCLUSION

For the reasons stated, the American Council on Education, the Association of American Medical Colleges and the Federation of State Medical Boards respectfully urge that the decision below should be reversed.

Respectfully submitted,

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